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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. [redacted] 106

MOSE HIGHTOWER AND CELESTINE MORRIS,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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STATUTE INVOLVED.

Section 2554(a) Title 26, U. S. Code, provides:

> "It shall be unlawful for any person to sell, barter, exchange or give away any of the drugs mentioned in Section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary of the Treasury."
>
> Note: The drugs mentioned in Section 2550(a) of Title 26, U. S. Code, are opium, coca leaves, any compound, salt, derivative or preparation thereof.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, Mose Hightower and Celestine Morris, respectfully pray that a Writ of Certiorari be issued by this Court to review a judgment of the Circuit Court of Appeals for the Seventh Circuit, entered May 20, 1948, affirming a judgment of the United States District Court for the Northern District of Illinois (Rec. 104).

Summary Statement of the Matter Involved.

The Circuit Court of Appeals did not render a written opinion in this case, but instead, announced orally from the bench in open Court, immediately after conclusion of

the argument, its affirmance of the judgment of the District Court.

The Petitioners were charged in three counts of an indictment, (the three counts concerned herein) with having violated the Narcotic Laws of the United States (R. 234), each count concerned herein specifically charging a violation of Section 2554 (a), Title 26, U. S. Code, which reads as follows:

> "It shall be unlawful for any person to sell, barter, exchange or give away any of the drugs mentioned in Section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary of the Treasury."

Note: The drugs mentioned in Section 2550 (a) of Title 26, U. S. Code, are opium, cocoa leaves, any compound, salt, derivative or preparation thereof.

The defendant Mose Hightower was found guilty on Counts 2 and 3 (R. 87) and was sentenced by the trial Court to three years imprisonment (R. 92). The defendant Celestine Morris was found guilty on Count 7 (R. 87) and was sentenced to 2 years imprisonment (R. 89), from which judgments an appeal was taken to the Circuit Court of Appeals on November 14, 1947.

Inasmuch as under the rules of this Court only such statement of the case is necessary or proper which is material to the consideration of the questions presented, no attempt will here be made to review or summarize the record. The main point of law relied upon by the Petitioners is that no evidence whatsoever was presented by the Government, to prove a material and necessary allegation of the indictment, that is, that portion of each of

the counts concerned herein which alleged a sale of narcotics—"Not in pursuance of a written order from the purchaser on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States."

The entire record is completely silent and devoid of any evidence as to whether or not the purchaser had, or used, said written order. The only evidence offered by the Government was to prove sales and even the proof as to sales was extremely doubtful, in view of the possible motives for revenge (R. 79) and leniency (R. 54) on the part of the two drug addicts who testified for the Government. But there was no evidence whatsoever as to the presence or absence of the said written order from the purchaser. The Government maintained in its brief filed in the Circuit Court of Appeals and insisted in the oral argument before said Court that it was not necessary to either allege or prove that the sale was not in pursuance of a written order, and thereby sought to justify the lack of any evidence pertaining thereto, after admitting in its brief, on page 10 thereof, that it had offered no evidence to prove that the sale was not in pursuance of a written order, further stating in said brief on page 10, "Nor is the Government required so to do."

Each one of the three counts concerned herein charges the same type of crime and count 2 is set forth verbatim to illustrate the allegations made therein as illustrative of the other two counts, as follows:

> "The July 1946 Grand Jury further charges: That on or about November 5, 1945, at Chicago, in the Northern District of Illinois, the defendant, Mose Hightower, alias Cotton, did wilfully and unlawfully sell to one Cleo Harris for the sum of Six ($6.00) Dollars, a quantity of certain derivatives of opium,

to-wit Twenty-Eight (28) grains of mixed heroin and morphine, not in pursuance of a written order from the said Cleo Harris on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States."

Both defendants moved for judgment of acquittal on the ground that the Government had failed to prove the allegations of the indictment, but said motions were overruled by the Trial Court (R. 65). The Circuit Court of Appeals was squarely presented with the issue as to whether or not the Government, by proving only a sale, and nothing as to the written purchase order, had proved the allegations in the indictment. The Government, on page 10 of its brief filed in the Circuit Court of Appeals stated as follows: "The Government did not offer direct evidence to negative the statutory language that the sale was not in pursuance of a written order, nor is the Government required so to do", and on page 11 of said brief, stated, "While revenue measures provide the basis upon which narcotic laws are enforced, nevertheless, it is the *sale* (italics supplied) which constitutes the gist of the offense."

During the oral argument before the Circuit Court of Appeals the Government likewise consistently maintained that it was not necessary, in view of decisions of other Circuit Courts of Appeals, primarily *Chin Gum* v. *United States,* (C.C.A. 1) 149 F. (2d) 575, 577 and *Sauvain* v. *United States,* (C.C.A. 8), 31 F. (2d) 732, 733, to prove that a purchaser of narcotics did so without a written order on the form prescribed.

Basis of Jurisdiction to Review the Judgment.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925 (43 Stat. 936; Title 28 U.S.C.A. 347); also because the Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by this Court, (Supreme Court Rule 38, Par. (5) (b)), namely, as to whether or not it is necessary for the Government, in a prosecution for violation of Section 2554 (a), Title 26, U. S. Code, to prove that the sale of narcotics was not pursuant to the required written purchase order from the purchaser; also because the Circuit Court of Appeals and other Circuit Courts of Appeals have decided a federal question in a way probably in conflict with an applicable decision of this Court, (Supreme Court Rule 38 (5) (b)), namely, the decision in the case of *Blockburger* v. *United States,* 284 U. S. 299, in which case this Court held, on p. 302, "The Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs, but penalizes any sale made in the absence of either of the qualifying requirements set forth", the qualifying requirements in that case being a sale of narcotics not in or from the original stamped package in the one count and a sale of narcotics not pursuant to a written purchaser order in the other count. On page 304 of said case, this Court said further, "Each of the offenses created *requires proof of a different element,* (italics supplied)", in other words, that the Government had to prove the sale was not in or from the original stamped package in regard to the one count and that the Government had to prove the sale was not pursuant to a written purchase order in regard to the other count.

In the instant case the Circuit Court of Appeals affirmed a judgment of conviction (R. 104) entered against the defendants upon insufficient proof. The evidence in the record concerned only the sale, and there was no proof, as

the Government admits, of the "qualifying requirement"' and "additional element", that is, there was no proof pertaining to the required purchase order. Nevertheless, knowing of this complete absence of material proof, because of the admission as to its absence by the Government in its brief and during the oral argument, the Circuit Court of Appeals, by affirming the judgment of conviction, in effect said the Government did not have to introduce any proof in regard to the required purchase order and that all the Government had to prove was the sale alone, and therefore the decision of the Circuit Court of Appeals is in conflict with the decision of this Court in the *Blockburger* case. Furthermore, in the *Blockburger* case, this Court expressly disapproved the case of *Ballerini* v. *Aderholt*, 44 F. (2d) 352 (C.C.A. 5). The *Ballerini* case held that all the Government had to do to make out a complete case of a narcotic law violation was merely to prove a sale and nothing else, and the Circuit Court of Appeals in the instant case has held the same way.

Furthermore, the petitioners have not been accorded due process of law under the Fifth Amendment to the Constitution of the United States, which provides that:

> "No person shall be deprived of life, liberty, or property, without due process of law."

Due process of law requires that the Government prove each and every material allegation of an indictment before a defendant can be convicted, and here the Government failed to do so by reason of having failed to present any evidence to prove the sale of narcotics was not pursuant to the prescribed purchase order.

The Question Presented.

In a prosecution for violation of Section 2554 (a) of Title 26, U. S. Code, is it necessary for the Government to prove that the sale of narcotics was not pursuant to the required written purchase order from the purchaser, or is it sufficient for conviction of the defendant if the Government proves only the sale.

Reasons Relied On for the Allowance of the Writ.

(1) The following are the special and important reasons why this Court should grant the Writ of Certiorari:

1. The Circuit Court of Appeals rendered a decision which is probably in conflict with an applicable decision of this Court, as set forth in *Blockburger* v. *United States,* 284 U. S. 299, when, by affirming the judgment of the lower court, the Circuit Court of Appeals held that the Government merely had to prove a sale of narcotics and nothing else to justify a conviction for a violation of Section 2554 (a) of Title 26, U. S. Code. The Circuit Court of Appeals for the First Circuit did likewise in the Case of *Chin Gum* v. *United States,* 149 F. (2d) 575, 577. (C.C.A. 1)

2. The Circuit Court of Appeals rendered a decision upon an important question of federal law, which has not been, but which should be, decided by this Court, and that is whether or not the Government in a narcotics prosecution under Section 2554 (a) of Title 26, U. S. Code has to prove not only a sale of narcotics, but also that the sale was not pursuant to the required purchase order from the purchaser.

Wherefore, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh

Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, Number 9511, *Mose Hightower, et al., Defendants-Appellants* v. *The United States of America, Plaintiff-Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

EDWARD J. BRADLEY

Attorney for Petitioners

Dated June 11, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No.

MOSE HIGHTOWER AND CELESTINE MORRIS,
Petitioners,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The United States Circuit Court of Appeals for the Seventh Circuit did not render a written opinion, but instead announced orally in open court at the conclusion of oral argument herein, on May 20, 1948, that the judgment of the United States District Court for the Northern District of Illinois was affirmed. (R. 104)

Jurisdiction.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended (28 U.S.C. 347). The Circuit Court of Appeals has in this case "decided an important question of federal law which has not been, but should be, settled by this Court" (Supreme Court Rule

38 (5) (b)). Furthermore, the Circuit Court of Appeals decided a federal question in this case in a way probably in conflict with an applicable decision of this Court, namely, *Blockburger* v. *United States* 284 U.S. 299. This is also true of the decision by the Circuit Court of Appeals for the First Circuit in the case of *Chin Gum* v. *United States,* 149 F (2d) 575, 577.

In addition, the Petitioners have been deprived of a right guaranteed to them by the Fifth Amendment of the United States Constitution, in that the failure of the Government to prove all of the material elements constituting the crime of which they are charged has deprived them of liberty without due process of law.

Statement of the Case.

The defendants, Mose Hightower, Celestine Morris, Guy Chaffin and Aline Boyd, were prosecuted in The United States District Court for The Northern District of Illinois under an indictment consisting of seven counts. The first count charged a conspiracy to commit a violation of the narcotic laws, and the remaining six counts charged the substantive crimes consisting of alleged sales in violation of the narcotic laws (R. 2, 3, 4).

The only defendants concerned in this petition are Mose Hightower and Celestine Morris, and the only counts of said indictment concerned in this petition are Counts 2, 3 and 7, inasmuch as the defendants Mose Hightower and Celestine Morris were found not guilty as to Count 1, (R. 87) the Court dismissed Counts 4 and 5 on motion of the Government (R. 12) and the only defendant mentioned in Count 6 was Guy Chaffin, (R. 4) who pleaded guilty to Count 1 and Count 6 (R. 6) and was sentenced to 2 years imprisonment (R. 7).

Counts 2, 3 and 7, (R. 3, 4) the only Counts concerned in this appeal, each charge the same type of substantive crime, that is, a violation of Section 2554(a), Title 26, U. S. C. (unlawful sale of narcotics not pursuant to a written order from the purchaser on a form issued in blank for that purpose by the Commissioner of Internal Revenue of The United States).

The Defendant Mose Hightower is named as defendant in Counts 2 and 3 (R. 3, 4) and the defendant Celestine Morris is named as defendant in Count 7 (R. 4). Both defendants entered their pleas of not guilty to the Indictment (R. 6), waived a jury (R. 11) and were tried by the Court (R. 11). Both of said defendants were found not guilty on Count 1 (R. 87). The defendant Mose Hightower was found guilty on Counts 2 and 3 (R. 87) and was sentenced to 3 years imprisonment (R. 92) and the defendant Celestine Morris was found guilty on Count 7 (R. 87) and was sentenced to 2 years imprisonment, (R. 89), from both of which judgments an appeal was taken to the Circuit Court of Appeals (R. 98). The error relied upon arose out of failure to sustain the motions made by the defendants Mose Hightower and Celestine Morris for judgment of acquittal (R. 63, 64), so far as said appeal was concerned.

The main point of law relied upon by petitioners in said appeal was that the trial court erred in overruling the motions of the defendants Mose Hightower and Celestine Morris for judgment of acquittal, (R. 65) inasmuch as the evidence was insufficient to sustain their convictions:

In that it failed to establish:

That the alleged sales of narcotics were not in pursuance of written orders from the purchasers on forms issued in blank for that purpose by the Commissioner of Internal Revenue of the United States.

Specification of Errors.

The United States Circuit Court of Appeals erred in holding the Government was merely required to prove a sale of narcotics and nothing else in order to convict a defendant of a criminal violation of Section 2554 (a), Title 26, U.S. Code. The court erred when it held that it was not necessary in a prosecution under said statute to prove that the purchaser of narcotics did so without a written order on the form prescribed by said statute.

ARGUMENT.

No Evidence Was Presented by the Government to Prove That the Alleged Sales of Narcotics Were Not Made in Pursuance of Written Orders From the Alleged Purchasers on Forms Issued in Blank For That Purpose by the Commissioner of Internal Revenue of the United States. The Government Is Required to Prove This Allegation Before the Defendants Can Be Convicted Under the Statute Herein.

This prosecution is brought under the Internal Revenue Code, and the defendants are charged with having violated Section 2554(a) of Title 26, U.S.C., so far as Counts 2, 3 and 7 of the Indictment are concerned. The present section 2554(a) of Title 26, U.S.C. is the old section 2 of the original Harrison Narcotic Act, C. 1, Section 2, 38 Stat. 785, 786 as amended, and retains the same wording as the original section 2 with the one exception that the written order form required is to be issued by the Secretary of The Treasury, instead of The Commissioner of Internal Revenue (The substitution of the Secretary of The Treasury in place of the Commissioner of Internal Revenue was accomplished by the Act of March 3, 1927, Ch. 348, Sec. 4(a), 44 Stat. 1382, 69th Congress).

Counts 2, 3 and 7 of the Indictment (the only Counts concerned on this petition) each charge the same type of crime, that is, a sale of a derivative of opium not in pursuance of a written order from the purchaser on a form issued in blank for that purpose by the Commissioner of Internal Revenue of The United States. The defendant Mose Hightower is charged in Counts 2 and 3 with having made such sales not in pursuance of a written order, etc.,

and the defendant Celestine Morris is charged in Count 7 with having made such a sale not in pursuance of a written order, etc. Both defendants entered a plea of not guilty and were tried by the Court, a jury having been waived. In a criminal prosecution, pleas of not guilty place on the government the burden of proving beyond a reasonable doubt every essential element of the offenses charged. *Prettyman* v. *United States,* 180 Fed. 30 (C.C.A. 6); *U. S.* v. *Gooding,* 25 U.S. 460. The burden of proof in a criminal case is always on the prosecution and never shifts. *Lillienthal's Tobacco* v. *United States,* 97 U.S. 237.

Since, therefore, the government had to prove every essential element of the crimes charged by Counts 2, 3 and 7, it becomes important to determine whether that portion of each of said counts 2 and 3 which states "not in pursuance of a written order from the said Cleo Harris on a form issued in blank for that purpose by the Commissioner of Internal Revenue of The United States" and that portion of said Count 7 which states "not in pursuance of a written order from the said Melvin Felsenheld on a form issued in blank for that purpose by the Commissioner of Internal Revenue of The United States" constitutes an essential element of the crimes charged which must be proven by the government before the defendants can be convicted.

The petitioners respectfully urge that the aforesaid portion of each of said counts 2, 3 and 7 is an essential element of the crime charged, which must be alleged and proven by the government.

In *Blockburger* v. *United States,* 284 U. S. 299, this Court clearly stated that the government had to prove that the sale was not in pursuance of a written order of the person to whom the drug was sold. In that case the

petitioner was charged with having committed two distinct crimes, although he made only one sale of narcotics, so far as the third and fifth counts of the indictment were concerned. The third count charged a sale of eight grains of a drug not in or from the original stamped package (the old section 1 of the original Narcotic Act, now section 2553(a) of Title 26, U.S.C.) and the fifth count charged the aforesaid sale also as having been made not in pursuance of a written order of the purchaser as required by statute (the old section 2 of the original Narcotic Act, now section 2554(a) of Title 26, U.S.C.). The Court sentenced the petitioner to five years imprisonment and a fine of $2,000.00 upon each count, the terms of imprisonment to run *consecutively;* and this judgment was affirmed on appeal, 50 F. (2d) 795 (C.C.A. 7). The principal contention made by the petitioner was that the aforesaid third and fifth counts charged the same sale, and therefore but one offense for which only a single penalty lawfully may be imposed. This Court said (p. 302):

> "The Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs, but penalizes any sale made in the absence of either of the qualifying requirements set forth";

the qualifying requirements being in the one case the original stamped package and in the other case the written order of the purchaser. This Court said further, on p. 304:

> "The statute is not aimed at sales of the forbidden drugs *qua* sales, a matter entirely beyond the authority of Congress, but at sales of such drugs in violation of the requirements set forth in sections 1 and 2, enacted as aids to the enforcement of the stamp tax imposed by the act. See *Alston* v. *United States,* 274 U.S. 289, 294; *Nigro* v. *United States,* 276 U.S. 332, 341, 345, 351."

This Court went on to say, on p. 304:

> "Each of the offenses created *requires proof of a different element.* The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires proof of a fact which the other does not. Gravieres* v. *United States,* 220 U. S. 338, 342, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey* v. *Commonwealth,* 108 Mass. 433: 'A single act may be an offense against two statutes; and if each statute *requires proof of an additional* fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' Compare *Albrecht* v. *United States,* 273 U.S. 1, 11-12, and cases there cited. The case of *Ballerini* v. *Aderholt,* 44 F. (2d) 352, is not in harmony with these views and is disapproved." (Emphasis added.)

Thus it was held by this Court that where the crime charged was a sale of narcotics not in pursuance of a written order of the purchaser on the form required, the government had to prove that there was no such written order from the purchaser of the drug.

It is noted that this court in the foregoing case expressly disapproved the case of *Ballerini* v. *Aderholt,* 44 F. (2d) 352 (C.C.A. 5), and a study of the latter case in the light of its disapproval by this court illustrates clearly that the allegation in the indictment which states that the sale was not in pursuance of a written order from the purchaser is a material allegation which must be alleged and which the government has the burden of proving. In the *Ballerini* case, the defendant was indicted under a two count indictment, both counts being based upon the same sale of an

ounce of heroin, a derivative of opium. The first count charged that defendant had made a sale without being registered and without having paid the special tax required by law, and the second count charged that he made the sale without requiring from the purchaser a written order issued in blank by the Commissioner of Internal Revenue; all in violation of the Harrison Narcotic Act. Defendant entered his plea of guilty to both counts, and was sentenced to 5 years on the first count and 4 years on the second count, to run consecutively. After serving 5 years on the first count, the defendant then sought by writ of habeas corpus to obtain his release from prison on the ground that the two counts of the indictment charged the same offense. The District Court denied the prayer of the petition and defendant appealed. The United States Circuit Court of Appeals, 5th Circuit, in reversing the judgment of the District Court, said (on p. 353):

> "It was the *sale* (emphasis added) and not the failure to register, pay the tax, or secure the written order, that constituted the offense. Because of the presumption created by the narcotic statute, *the government makes out a complete case, upon proof of sale,* under each count of an indictment which charges failure to register and pay the tax, *to secure a written order* or to sell out of an unstamped package. *The result is that upon proof of a single sale, and in the absence of any proof by the defendant, the government is entitled to ask for a conviction upon any one of the counts in the indictment. And so upon the same evidence the defendant may be convicted upon each count.*" (Emphasis added.)

This is the case which this court in the *Blockburger* case as described heretofore expressly disapproved—and we have the same situation as to the petitioners Hightower and Morris in the instant case, that is to say, that

even conceding for the sake of argument that the government proved a sale that is all the government proved. *No evidence whatsoever was introduced to prove that the sale was not in pursuance of the required written order as alleged in counts 2, 3 and 7.*

The Circuit Court of Appeals below, also in the case of *Blockburger* v. *United States,* 50 F. (2d) 795 (C.C.A. 7), decided June 11, 1931, likewise disagreed with the ruling of the United States Circuit Court of Appeals for the 5th Circuit in the aforementioned case of *Ballerini* v. *Aderholt,* 44 F. (2d) 352 (C.C.A. 5), saying (p. 797) that it could not accept the reasoning of the United States Circuit Court of Appeals for the 5th Circuit in the *Ballerini* case as a proper construction of the narcotic statute nor of the Supreme Court decisions pertaining to the same question. The Circuit Court of Appeals below stated, on p. 797:

> "Neither the sale, the failure to register, pay the tax, or secure the written order, *in and of itself constitute a crime;* but *the sale in conjunction with* either the failure to register, pay the tax, or *secure the written order does constitute a separate crime* as we interpret the statute and as we think the Supreme Court has interpreted it." (Emphasis added.)

The Circuit Court of Appeals below said further:

> "The test of identity of offense is whether the same evidence is required to sustain them; if not, then the fact that both charges relate and grow out of one transaction does not make a single offense where two are defined by statute," citing *Morgan* v. *Devine,* 237 U.S. 632.

It is true that in the case of *Chin Gum* v. *United States,* 149 F. (2d) 575, 577 (C.C.A. 1), the court held that it was not necessary for the government either to allege or prove that a purchaser of opium did so without a written order

on the form prescribed. In this case the government merely proved a sale, and introduced no evidence that said sale was not in pursuance of the required written order from the purchaser. The Court said, on p. 577, that it could briefly dispose of this particular ground of appeal (*i. e.*, the lack of proof as to the written order), and did dispose of it briefly by stating that it has repeatedly been held that there is no requirement that the government either allege or prove that the sale was not pursuant to the prescribed written order from the purchaser of the drug, and the Court cited cases as so holding. It is respectfully submitted that this case does not correctly state the law, but instead seems to follow the ruling in the case of *Ballerini* v. *Aderholt,* heretofore cited, 44 F. (2d) 352 (C.C.A. 5) to the effect that the government need only prove a sale and nothing more in order to convict, which ruling, as stated heretofore, has been expressly disapproved by this court in *Blockburger* v. *United States,* heretofore cited, 284 U.S. 299 and by the court below in *Blockburger* v. *United States,* heretofore cited, 50 F. (2d) 795 (C.C.A. 7).

There are a few additional cases which upon first glance seem to hold contrary to the views expressed herein; but a careful reading of them shows that such is not the case. For instance, in the case of *Nigro* v. *United States,* 117 F. (2d) 624, 629 (C.C.A. 8), the court held that in a prosecution under section 2554 (a) of the Anti-Narcotic Act it is unnecessary to plead the exceptions to the statute. But what exceptions is the court referring to? Clearly those exceptions which are set out by themselves in paragraphs (b) and (c) of section 2554, that is, those exceptions which pertain to the Virgin Islands, use of drugs by physicians in the course of professional practice, use of drugs in prescriptions, and Government and state officials. In fact, in

that case the particular exception concerned was the one which pertained to the dispensing of drugs by a physician in the course of his professional practice. The indictment failed to negative this exception and the court held it did not have to. In the case of *Hurwitz* v. *United States*, 299 Fed. 449 (C.C.A. 8), the court made a similar ruling, to the effect that the indictment need not negative the exemptions contained in section 2 of the Narcotic Act (the present section 2554 of Title 26, U.S.C.). It is clear that the court was not referring to the written order requirement of section 2554 (a), since the indictment did allege a sale not in pursuance of the required written order. A similar ruling as to there being no necessity to negative exemptions and exceptions, and as to what exemptions and exceptions were meant by the court, is contained in the case of *Manning* v. *United States*, 275 Fed. 29, 32, (C.C.A. 8). Another case of this type is *Sawain* v. *United States*, 31 F. (2d) 732, 733 (C.C.A. 8), but the decision in that case is based heavily upon the fact that the government need not allege or prove the existence of exemptions (the court apparently construing that portion of the statute which reads "not in pursuance of a written order," etc. as an exemption or exception which did not have to be either alleged or proven by the government. The court also relied heavily upon the case of *Taylor* v. *United States*, 19 F. (2d) 813 (C.C.A. 8) decided by the same court, but the latter case was so decided because the statute under which that prosecution was brought, Section 1 of the Narcotic Act, (now section 2553 (a) of Title 26, U.S.C.) made possession of drugs in the absence of accompanying tax-paid stamps *prima facie* evidence of a violation of said statute, and therefore shifted the burden of going forward and showing he had not violated the act on the defendant; the court also based its ruling heavily upon the theory that

the facts as to registration and payment of tax were peculiarly within the defendant's knowledge (probably since the latter might have been done by agent or under a different name, etc.). No such *prima facie* presumption is to be found in the wording of section 2554 (a) under which the instant case against Hightower and Morris was prosecuted, nor was the presence or absence of a written order from the purchaser a fact peculiarly within their knowledge, since the government used as witnesses to prove the sales the very persons who allegedly made the purchases, and the government could easily have established by such witnesses, if true, that the sales in question were not in pursuance of written orders from said purchasers on the required forms, but the government wholly failed to do so and thus did not prove this material element of the crime charged. Another case apparently against the contention of the petitioners Hightower and Morris is that of *Martinez* v. *United States,* 25 F. (2d) 302, 303 (C.C.A. 5) where the court stated, in a very short opinion, on p. 303, that all the government had to prove was the sale, because the government was not bound to prove a negative when the fact as to whether there was a written order was one "peculiarly within the knowledge of the defendant." In view of what has already been said, and especially in view of the ruling by this Court in the *Blockburger* case (*Blockburger* v. *United States,* 284 U.S. 299), it is respectfully submitted that the ruling in the *Martinez* case is not the present law. In addition, the existence or absence of written purchase orders in the instant case is not a matter "Peculiarly within the knowledge of the defendants."

Speaking further of statutes which contain an exception or exemption, and as to whether such exception or exemption must be alleged and proven by the government it

is believed the case of *United States* v. *Britton*, 107 U.S. 655, 669, 670, 27 L. Ed. 520, is illustrative of the correct law on the subject. In that case this court was construing a federal statute (section 5201 of the Revised Statutes) which applied to the purchase of its own shares by a national banking association, and which contained an exception in the body of the enacting clause of the statute itself (just as does section 2554 (a) of Title 26, U.S.C. in the instant case). This Court said, on pp. 669 and 670:

> "It is not every purchase of its own shares by an association that is forbidden. The very section (5201) and sentence of the statute which declares that no banking association shall be a purchaser of its own shares, contains the exception 'unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith'. This exception should have been negatived in these counts. The rule of pleading as laid down by Mr. Chitty is that 'when a statute contains provisos and exceptions in distinct clauses it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains. *On the contrary, if the exceptions themselves are stated in the enacting clause it will be necessary to negative them in order that the description of the crime may, in all respects, correspond with the statute,*' 1 Chitty, Crim. Law, 283b, 284. Thus, where a statute declared that if one on the Sabbath day 'shall exercise any secular labor, business, or employment, except such only as works of necessity and charity, he shall be punished', etc., *a negative of the exception was held indispensable* (emphasis added), *State* v. *Barker*, 18 Vt. 195. See also *Commonwealth* v. *Maxwell*, 2 Pick (Mass.) 139; 1 East, P. C. 167; *Spieres* v. *Parker*, 1 T. R. 141; *Gill* v. *Scrivens*, 7 id 27, 1 Bishops' Crim. Pr. 636. The failure of the counts under consideration to aver that the purchase of the shares of

> the association was not necessary to prevent loss upon a debt previously contracted in good faith is a fatal defect." (Emphasis added.)

—and so, also, it follows that the failure on the part of the government to prove such a necessary allegation, if it had been properly pleaded in the indictment, would have required a judgment of not guilty, since the government had failed to prove its case. The statute in the instant case (section 2554(a) of Title 26, U. S. C.) is very similar in wording to the statute in the case just discussed, since it also prohibits something (a sale of narcotics) *unless* such sale is pursuant to the required written order from the purchaser. It is clear from a reading of section 2554(a), Title 26, U. S. C. that the exception as to a sale made pursuant to a certain type of written order from the purchaser is stated in and is a part of the enacting clause of the statute itself, and in order to constitute a valid indictment charging a violation of said section 2554(a) of Title 26, U. S. C. this exception had to be pleaded in the indictment (which was done) and had to be proven at the trial (which the government wholly failed to do).

In *United States* v. *Cook,* 84 U.S. 168, 17 Wall 168, 176, this court said, in speaking of a statute containing an exception:

> "the only real question in the case is whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the

> pleading. But if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, *then it is a matter of defense and must be shown by the other party.*" (Emphasis added.)

But if it is so incorporated with the clause describing the offense that it becomes in fact a part of the description of the crime itself, then it must be alleged and proven by the prosecution.

Is the exception clause (consisting of the words "except in pursuance of a written order," etc.) so incorporated with the clause describing the offense (section 2554(a) of Title 26, U. S. C.) that it becomes in fact a part of the description of the offense? It is respectfully urged that it is so incorporated, since section 2554(a) of Title 26, U. S. C. would not charge a federal crime and would be unconstitutional without said exception clause. See *Nigro* v. *United States*, 276 U. S. 332, in which questions were raised as to section 2 of the original Narcotic Act (now section 2554(a) of Title 26, U. S. C.) This court said, on p. 341:

> "In interpreting the Act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs it is beyond the power of Congress and must be regarded as invalid. Everything in the construction of Section 2 must be regarded as directed towards the collection of the taxes imposed in Section 1 and the prevention of evasion by persons subject to the tax. If the words cannot be read as reasonably serving such a purpose, section 2 cannot be supported." The court went on to say, on p. 345, that the provisions of section 2 making it an offense to sell unless the purchaser gives a particular official form of order to the seller was enacted for the purpose of

successfully collecting the tax imposed. The court said on p. 348: "Section 1 punishes sales by persons who have neither registered nor paid the tax. Section 2 punishes persons who sell, not in pursuance of a written order of the person to whom the sale is made." Thus each section refers to sales, but additional proof is required to establish whether a violation of section 1 or of section 2 was committed. On p. 351 the court said: "Both the registered and the non-registered seller are, under our construction of the section, *punished for not using the order forms as the statute requires, or for misusing them.*" (Emphasis added.)

In the case of *United States* v. *Doremus,* 249 U. S. 86, 94, section 2 narrowly missed being declared unconstitutional (this court was divided five to four) as an unlawful invasion by Congress of the police powers reserved to the several states. The only reason section 2 was declared to be constitutional was because of the requirement that the purchaser furnish the proper order form, since this showed that section 2 was aimed at collecting the tax to be paid, and was therefore valid as a taxing measure. See *Nigro* v. *United States,* 276 U. S. 332, 339 and *Alston* v. *United States,* 274 U. S. 289, 294 in which it was held that the Narcotic Act must be assumed to be a taxing measure, for otherwise it would be no act at all.

Since the incorporation of the written order form clause in the statute prohibiting the sale of narcotics is necessary if said statute is to be declared constitutional, it would seem that it is absolutely necessary that the government allege and prove said clause in a prosecution for violation of said statute.

It is also clear that the petitioners were convicted without the due process of law required by the Fifth Amendment of the Constitution of the United States, since a

material element of the crime they were accused of was not proven.

The government failed to introduce any evidence to the effect that the alleged sales in Counts 2, 3 and 7 were not in pursuance of written orders from the purchasers on forms issued in blank for that purpose by the Commissioner of Internal Revenue and accordingly there is insufficient evidence to support the convictions of the defendants Mose Hightower and Celestine Morris, and therefore the Circuit Court of Appeals for the Seventh Circuit erred in affirming said convictions.

Respectfully submitted,

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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 106

MOSE HIGHTOWER AND CELESTINE MORRIS,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The circuit court of appeals orally affirmed the judgment of the district court (R. 104-105) without a written opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 20, 1948 (R. 104) and the petition for a writ of certiorari was filed June 3, 1948. The jurisdiction of this Court is invoked under Section

240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether, in a prosecution under 26 U. S. C. §2554(a), making unlawful the sale of opium or its derivatives except pursuant to written orders on forms issued in blank for that purpose by the Secretary of the Treasury, the burden of the evidence was on the prosecution to prove that sales were not made pursuant to such written orders.

STATUTORY PROVISION INVOLVED

26 U. S. C., §2554(a) provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary [of the Treasury.]

STATEMENT

The facts relevant to this petition are undisputed and briefly summarized are as follows:

The petitioners, Mose Hightower and Celestine Morris, were indicted, on August 6, 1946, in multiple counts, along with two others, Aline Boyd and Guy Chaffin, in the United States District

Court for the Northern District of Illinois, Eastern Division, for conspiracy to sell and for the substantive offenses of selling quantities of a derivative of opium not in pursuance of written orders on the proper blank (R. 2-5). Chaffin pleaded guilty and was sentenced to two years' imprisonment (R. 7), and the charge against Boyd was dismissed because she could not be found (R. 10-11). The petitioners herein pleaded not guilty (R. 6), waived jury trial through their respective counsel (R. 8, 9), and were found not guilty of the conspiracy count (R. 87), but Hightower was found guilty on two counts charging the substantive offenses, and Morris on one (R. 87). The latter was sentenced to two years' imprisonment (R. 89), and Hightower was ordered imprisoned for a period of three years (R. 91-92).

Counts 2 and 3 on which Hightower was convicted involved sales occurring on November 5 and 7, 1945, at Chicago to one Cleo Harris, who was a witness for the prosecution at the trial (R. 54), and the sale charged in count 7 on which petitioner Morris was convicted occurred on March 3, 1946, at Chicago, and one Felsenheld, the vendee therein likewise testified for the Government (R. 14). Corroborating the testimony of these two witnesses were three narcotic agents and a district supervisor of the Bureau of Narcotics.

With regard to the sale by petitioner Morris, Felsenheld, the informer and a confessed drug addict,

testified that he knew both petitioners; that on March 3, 1946, he telephoned Hightower and sought to purchase a quantity of narcotics; he was told by Hightower that petitioner Morris would meet him that evening at a given location (R. 15). Thereafter, he contacted Newman, a narcotic agent, who searched him (R. 16), and furnished him $8. He met petitioner Morris at the rendezvous, drove her in his taxicab to the 1900 block of Washington Boulevard, Chicago, and in reply to her question as to the amount he wanted to buy, replied he wanted a grain (R. 16). At their destination, Morris entered a building and cam(out with four one-quarter grain tablets of morphine which she gave to Felsenheld in exchange for the $8. (R. 16). The tablets were placed in an envelope, initialed by the witness, and were subsequently introduced in evidence without objection (R. 19). This testimony was corroborated by agent Newman, who testified that he had searched Felsenheld to determine that he had no narcotics, gave him $8, followed Felsenheld's cab, saw petitioner Morris enter it and later on the same evening met Felsenheld at a hotel where the latter gave the four tablets to him (R. 26).

Cleo Harris, the informer against Hightower, testified that on November 5, 1945, he had a conversation with Hightower at 3758 South Ellis Avenue, Chicago, relative to the sale of narcotics, and the latter ordered a woman who was present to sell

him a "couple of capsules" for $7, which was done (R. 54-55). Later on the same day, Hightower sold the informer another package for $6, which package was given by Harris to a narcotic agent (R. 55). Harris also testified that on November 7, 1945, he was searched by agent Frey, who then gave him $15 in order to purchase some heroin from Hightower. Harris went to the fish market where Hightower worked, and was told by the latter to meet him later on that day in front of a hotel, where Hightower and another unidentified man sold him three capsules of heroin for $9. (R. 58.)

Agents Frey, Newman and Gordon corroborated the testimony of Harris. Newman and Gordon testified that on November 5, 1945, Harris, was searched, was found to have no narcotics on him, and was furnished $25. Later on that day they met him, and he handed them the package containing a mixture of heroin and morphine, and change amounting to seventeen or nineteen dollars. (R. 28, 30.) The drug from the package was admitted in evidence without objection (R. 29). Agent Frey testified that on November 7, 1945, he searched Harris, found no narcotics, gave him $9, and followed him to the aforementioned hotel where he was observed by them in conversation with Hightower and another man. Later on Harris gave Frey three capsules of morphine, which were introduced in evidence without objection. (R. 46-47.)

ARGUMENT

Petitioners do not contend that there was not sufficient evidence to support the finding that the sales by petitioners actually took place; their sole objection is that the prosecution failed to introduce evidence that the surreptitious sales were not in pursuance of written orders on appropriate forms.

A short answer to the contention is that the circumstances of the sales permit the obvious inference that the transactions did not include written orders on appropriate forms. But in any event, it has been repeatedly held that the prosecution in a narcotic case of this type need neither allege (*Chin Gum* v. *United States,* 149 F. 2d 575, 577 (C. C. A. 1); *Nigro* v. *United States,* 117 F. 2d 624, 629 (C. C. A. 8); *Hurwitz* v. *United States,* 299 Fed. 449, 450 (C. C. A. 8), certiorari denied, 266 U. S. 613; *Manning* v. *United States,* 275 Fed. 29 (C. C. A. 8); *Oakshette* v. *United States,* 260 Fed. 830 (C. C. A. 5); *Wallace* v. *United States,* 243 Fed. 300, 304 (C. C. A. 7), certiorari denied 245 U. S. 650), nor prove (*Chin Gum* v. *United States, supra; Sauvain* v. *United States,* 31 F. 2d 732, 733 (C. C. A. 8); *Martinez* v. *United States,* 25 F. 2d 302, 303 (C. C. A. 5)), that the sale was made without a written order on the form prescribed.[1] These cases are supported either on the theory that that

[1] Compare *Crapo* v. *United States,* 100 F. 2d 996, 1001 (C. C. A. 10), which involved a prosecution for transferring a firearm not in pursuance of a written order on an appro-

part of §2554(a) reading, "except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary" of the Treasury creates an exception to the operation of the statute (*Manning* v. *United States, supra*), in which case the rule applies that it is unnecessary for the prosecution to plead or prove the exception (*Nicoli* v. *Briggs,* 83 F. 2d 375, 379 (C. C. A. 10), and cases cited therein); or that the above quoted provision is an essential element of the offense created by the section, requiring it to be alleged in the indictment in order that accused parties may be put on notice of the nature of the charge against them, and in order to prevent possible double jeopardy (cf. *Fippin* v. *United States,* 162 F. 2d 128, 131 (C. C. A. 9), but is a negative averment, in which situation the burden of the evidence is on the accused to disprove it. Thus in *Sauvain* v. *United States, supra,* the court at 31 F. 2d 733, stated:

> It is not incumbent upon the government to prove that the addict had no written order. Entirely aside from the provision of section

priate form, in violation of the National Firearms Act. There was no direct proof that the firearm was transferred to the defendant not in pursuance of a written order, but it was held that the negative averment in the indictment that such was the case placed on Crapo, the burden of the evidence of disproving it because the facts were peculiarly within his knowledge, citing numerous cases.

8 (26 U. S. C. §700), which makes it unnecessary for the government to negative, in either pleading or proof, the existence of exemptions, it has been held that the government need not prove a negative under the Narcotic Law. In *Taylor* v. *United States,* 19 F. (2d) 813, this court said:

"The sales having been established by the government, the burden was on the defendant to prove that he had registered and paid the special tax. The government is not required to prove a negative, if the defendant has in his possession the evidence of the affirmative. [Citing authorities.]"

26 U. S. C. §2554(d) requires every person who accepts a written order, required under §2554(a), to preserve it for two years in order that it might be available for Treasury Department employees or other interested officials. The petitioners' trial in the district court took place on November 5, 1945, within the two-year period from the sales alleged in count seven (sale by Morris on March 3, 1946), and count three (sale by Hightower on November 7, 1945), and one day beyond the two-year period in count two (sale by Hightower on November 5, 1945). Petitioners tendered no evidence at the trial calculated to show that they had such order forms in their files or that they had received them and since had disposed of them.

In *Martinez* v. *United States, supra,* a case involving a sale of morphine without a written order, the court stated, "The presumption arose that the sale was unlawful upon proof that it had been made, because the government was not bound to prove a negative when the fact as to whether there was a written order was one peculiarly within the knowledge of defendant." Petitioners insist that the fact whether there were written orders were not facts within their peculiar knowledge because the prosecution used as witnesses those parties who actually purchased the opium derivatives from petitioners. This, however, does not detract from the fact that petitioners easily could have established that the sales were pursuant to appropriate orders, if in fact they were. This is particularly so here, for both petitioners took the witness stand. In this aspect the case is controlled by *Chin Gum* v. *United States,* and *Sauvain* v. *United States,* both *supra.*

In the nature of things, it is much simpler for the accused to prove the affirmative, if in fact the affirmative exists, than for the prosecution to prove a negative, and it is for this reason, as the above-cited decisions demonstrate, that in federal courts especially such burden has been placed on the defendant in all cases where the evidence may more appropriately come from the defendant.[2] In the

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[2] See Annotation, 153 A. L. R. 1218, 1250.

instant case, the denial of petitioners' motions for judgments of acquittal at the close of the Government's case based on the ground of insufficient evidence, placed them on notice that a prima facie case had been made out, and they thus had an opportunity to introduce any evidence that was available refuting the Government's charges. Their failure to introduce the written orders which should accompany each sale, or to claim that they had ever received such orders, can only be explained by the fact that they never received such orders for the sales which were proved to have been made. It is also very significant that at no time in the district court, or in their brief on appeal, or in their brief in support of the petition in this Court, have the petitioners asserted that they had in their possession, or had ever received the required written orders.[3]

Petitioners' heavy reliance (Pet. 14-18) upon *Blockburger* v. *United States*, 284 U. S. 299, is misplaced. The issue there was whether one sale in which the forbidden drug was not in or from the original stamped package and was not sold in pursuance of a written order constituted two offenses.

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[3] Petitioner Morris, convicted as charged in count 7 of selling morphine to Felsenheld, denied on direct examination ever having sold any narcotics to Felsenheld (R. 82) and thereby implicitly denied ever receiving a written order from the latter. *McCurry* v. *United States*, 281 Fed. 532, 534 (C. C. A. 9). Her conviction of the sale would not affect this implicit denial.

In holding that it did, this Court neither considered nor decided the issue presented by this case, and that decision, therefore, is of no comfort to petitioners. This Court disapproved the decision in *Ballerini* v. *Aderholt*, 44 F. 2d 352, because the Fifth Circuit there held that only one offense was involved under facts similar to those of the *Blockburger* case.

CONCLUSION

The evidence of petitioners' guilt is overwhelming. The question presented by the petition for a writ of certiorari is one that has been uniformly resolved by the circuit courts of appeal in favor of the Government's position. It is not one which merits further review by this Court. We respectfully submit that the petition for a writ of certiorari should be denied.

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